

Rodriguez v Hanna

2014 NY Slip Op 30738(U)

March 18, 2014

Supreme Court, Suffolk County

Docket Number: 11E-19065

Judge: H. Patrick Leis III

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SHORT FORM ORDER

INDEX No. 11E-19065
CAL No. 13-01733MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 22 - SUFFOLK COUNTY

PRESENT:

Hon. H. PATRICK LEIS, III.
Justice of the Supreme Court

MOTION DATE 11-15-13
ADJ. DATE 3-6-14
Mot. Seq. 001 - MD

-----X

FAUSTO RODRIGUEZ,

Plaintiff,

- against -

AMAL HANNA,

Defendant.

-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (001) by Defendant dated October 18, 2013, including supporting papers and exhibits; (2) Affirmation in Opposition by Plaintiff dated February 12, 2014 and supporting papers; (3) Reply Affirmation by Defendant dated February 25, 2014 and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (001) by defendant Amal Hanna pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that plaintiff, Fausto Rodriguez, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

This negligence actions arises out of a motor vehicle accident which occurred on August 23, 2010, on Wicks Road at or near its intersection with Suffolk Avenue, Brentwood, Suffolk County, New York. The plaintiff, Fausto Rodriguez, alleges that he sustained serious injuries when his vehicle was struck by the vehicle operated by defendant Amal Hanna.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]);

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Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form ... and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of this motion, the defendant has submitted, *inter alia*, an attorney’s affirmation, copies of the summons and complaint, answer, plaintiff’s bill of particulars, the unsigned but certified transcript of the examination before trial of Fausto Rodriguez dated July 25, 2012, and copies of the reports dated September 6, 2012 for the independent orthopedic examination of the plaintiff by Salvatore Corso, M.D. and the independent neurological examination of the plaintiff by Roy Shannon, M.D.

Pursuant to Insurance Law § 5102 (d), “[s]erious injury” means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

The term “significant,” as it appears in the statute, has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a *prima facie* case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to “present evidence in competent form, showing that plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be competent or admissible, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the “permanent loss of use” category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96

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NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott, supra*).

By way of his bill of particulars, the plaintiff alleges that as a result of the subject accident he suffered injuries as follows: traumatic injury to the head and neck causing frequent headaches and restricted use, accompanied by bilateral neck pain and stiffness that radiates into the left shoulder, arm, and hand, accompanied by numbness and weakness of the left shoulder, arm, and hand, left paracentral disc herniation at C5-6 with mass effect on the thecal sac and cervical brachial syndrome, and EMG examination which revealed cervical radiculopathy; injury to the mid and lower back resulting in pain that radiates to the neck and lower back causing discomfort and limited motion, an annular bulge at L4-5, lumbar radiculopathy; injury to the left shoulder resulting in pain which radiates down into the arm and hand with numbness and weakness, causing limited motion and restricted use, a full-thickness tear of the supraspinatus tendon, partial undersurface tear of the infraspinatus tendon, and tear of the coracohumeral ligament; said injuries requiring extensive physical therapy and chiropractic treatment; confinement of the plaintiff to bed for one month and to home for one month; and rendering plaintiff totally disabled from employment from August 23, 2010 until present.

Based upon careful review and consideration of the evidentiary submissions, it is determined that the defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

Neither Dr. Shannon nor Dr. Corso have set forth their credentials or work experience and training, or provided copies of their respective curriculum vitae to qualify as experts in this matter, precluding summary judgment. None of the medical records reviewed by them have been provided in support of their opinions. It is determined that even if the defendant provided the copies of the medical records which their experts reviewed and on which they base their opinions, in part, as required pursuant to CPLR 3212, expert testimony is limited to facts in evidence (*see Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O’Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984], *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), which evidence has not been provided in this case.

The defendant has not provided copies of the MRI reports of plaintiff’s cervical or lumbar spine, or the EMG report, and defendant’s experts offer no opinions regarding the findings of these diagnostic studies. They do not indicate that those reports and studies were reviewed by them, leaving this court to speculate if their opinions would be different had they reviewed such studies and raising factual issues which preclude summary judgment as a matter of law.

Dr. Corso set forth that the 42 year old plaintiff presented with complaints of neck and lower back pain for which he received physical therapy and trigger point injections. Employing the use of a goniometer, Dr. Corso performed range of motion testing to plaintiff's cervical and thoracolumbar spine, and left shoulder, and compared those findings to the purported normal range of motion findings, setting forth no deficits. Dr. Corso's impression was that of status post cervical and lumbar sprain-resolved and left shoulder sprain-resolved. Although the plaintiff pleaded that he sustained cervical and lumbar radiculopathy, as demonstrated by EMG studies, Dr. Corso does not indicate that he reviewed the results of such studies, and does not rule out that the plaintiff sustained either cervical or lumbar radiculopathy as a result of this accident. Although the plaintiff has pleaded that he sustained left paracentral disc herniation at C5-6 with mass effect on the thecal sac and cervical brachial syndrome, and an annular bulge at L4-5, Dr. Corso does not indicate that he reviewed the MRI studies and does not rule out that such injuries are proximally related to the subject accident. Dr. Corso does not comment upon the plaintiff's claimed injury to his left shoulder and alleged full-thickness tear of the supraspinatus tendon, partial undersurface tear of the infraspinatus tendon, and tear of the coracohumeral ligament. Thus, Dr. Corso's report leaves this court to speculate as to those injuries claimed by plaintiff, and raises factual issues which preclude summary judgment.

Dr. Shannon employed the use of a goniometer in determining range of motion values for the plaintiff's cervical and thoracolumbar spine, and compared those findings to the normal range of motion values and reported no deficits. His impression was that of status post cervical and lumbar strain-resolved. While the plaintiff has pleaded that he suffers pain that radiates into the left shoulder, arm, and hand, accompanied by numbness and weakness of the left shoulder, arm, and hand, Dr. Shannon does not comment on this complaint or the results of the MRI examination. He does not comment upon the plaintiff's claims that he sustained left paracentral disc herniation at C5-6 with mass effect on the thecal sac and cervical brachial syndrome, or the annular bulge at L4-5. He does not comment upon the plaintiff's alleged injury to his left shoulder with pain which radiates down into the plaintiff's arm and hand or the numbness and weakness he experiences. Dr. Shannon does not rule out that the plaintiff's alleged injuries are causally related to the subject accident.

Additionally, the defendant's examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering their affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; see *Uddin v Cooper*, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), nor do the examining physicians comment on this period.

Further, the plaintiff testified that upon impact, he couldn't move because his neck was hurting and he could not open the door. He was taken by ambulance to Southside Hospital, received x-rays, and was treated and released to follow up with a doctor for his back. He received physical therapy and electrostimulation to his back six days a week for three months. Thereafter, his physical therapy treatments decreased to three to four days a week for about a year. At the time of his deposition, he was continuing physical therapy one day a week. He also received injections into his back twice, the last

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being two months prior to his giving testimony. Because he felt his condition was not changing, he obtained a second opinion with Dr. Nagi, a neurologist, who performed testing with needles. He also saw an orthopedist and underwent cervical and lumbar MRIs. For the first month following the accident, he was confined to his bed. He denied prior or subsequent injuries to his neck and back. Since the accident, he can no longer sit for "too long," and cannot engage in sports, such as volleyball, soccer, and cycling, which he did prior to the accident. He cannot drive for long periods, and cannot walk for "too long." He experiences back pain every day.

These factual issues raised in defendant's moving papers preclude summary judgment. The defendant failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" as to either category of injury within the meaning of Insurance Law 5102 (d) (see *Agathe v Tun Chen Wang*, 98 NY2d 345, 746 NYS2d 865 [2006]); see also, *Walters v Papanastassiou*, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury," it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (see *Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2nd Dept 2008]); *Krayn v Torella*, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; *Walker v Village of Ossining*, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]) as the burden has not shifted.

Accordingly, motion (001) by defendant for dismissal of the complaint on the basis that the plaintiff has failed to meet the serious injury threshold is denied.

Dated: 3-18-14

HON. H. PATRICK LEIS, III

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION